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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation award when successful retraining and reemployment efforts increase the worker's earning capacity.

LIST OF PARTIES

The parties to the proceeding resulting in the decision sought to be reviewed are:

John Rambo

Metropolitan Stevedore Company;[1] and

Director, Office of Workers' Compensation Programs, United States Department of Labor

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[1] In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Metropolitan Stevedore Company (hereinafter "Metropolitan") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Appendix, *infra*, 2a-5a) is reported at 28 F.3d 86. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (App., *infra*, 1a) is unpublished. The Decision and Order of the Benefits

Review Board (App., *infra*, 6a-10a) and the Decision and Order of the Administrative Law Judge (App., *infra*, 11a-17a) are unreported.

JURISDICTION

The Decision of the United States Court of Appeals for the Ninth Circuit was filed on June 24, 1994. (App. 2a) A timely Petition for Rehearing filed by Metropolitan was denied on August 10, 1994. (App. 1a) A Petition for Rehearing filed by the Director, Office of Workers' Compensation Programs, was denied on September 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2(10), 8(c)(21), 8(h), and 22 of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. Sections 902(10), 908(c)(21), 908(h), and 922, provide in relevant part as follows:

> 2(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;. . . .
>
> * * *
>
> 8(c)(21) . . . compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in

the same employment or otherwise, payable during the continuance of partial disability.

* * *

8(h) . . . if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [Administrative Law Judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * *

Sec. 22. . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the [Administrative Law Judge] may . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

STATEMENT

The United States Court of Appeals for the Ninth Circuit has ruled that the phrase "change in conditions" in Section 22, the LHWCA's single provision authorizing modification of awards, encompasses only "a change in a claimant's *physical* condition." *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86, at 87 (9th Cir. 1994) (emphasis in original) (App. 3a). This interpretation

is directly contrary to that adopted by the United States Court of Appeals for the Fourth Circuit, which has concluded that modification pursuant to Section 22 may be granted whenever a change in wage-earning capacity is proven and even if the improved or diminished ability to earn is accompanied by no change in a claimant's physical condition. *Fleetwood v. Newport News Shipbuilding & Drydock Co.*, 776 F.2d 1225, at 1232 (4th Cir. 1985). The question presented is which of these conflicting interpretations should control a workers' compensation system designed to serve as the nationally uniform determinant of the rights and responsibilities of injured maritime workers and their employers.

1. *Administrative Proceedings.* In November 1983, an Administrative Law Judge approved stipulations that John Rambo's back and leg injuries had lessened his weekly capacity to earn wages as a longshoreman by $120 and, pursuant to 33 U.S.C. Section 908(c)(21), awarded weekly benefits of $80. A few years later, Mr. Rambo completed necessary retraining and obtained a position as a crane operator, a much higher paying and less physically strenuous position.[2]

Metropolitan sought modification of the original award, contending that continuing benefits were no longer appropriate because the retraining and successful search for work as a crane operator had increased Mr. Rambo's earning capacity to the point that his economic

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[2] The new skills generated earnings of $1,505.21 weekly at the time modification was granted, a figure nearly triple the wages earned before injury in less skilled longshore work. *Rambo*, 28 F.2d at 86, App. 3a.

disability had ended. Mr. Rambo argued that his original award could be reduced only if his *physical* condition had improved.

The Administrative Law Judge rejected Mr. Rambo's argument, determined that his new skills and job had ended the adverse economic effects of the physical problems, and ordered benefits stopped. The Benefits Review Board affirmed.

2. *The Decision on Appeal.* Mr. Rambo appealed to the United States Court of Appeals for the Ninth Circuit, basing jurisdiction upon 33 U.S.C. Section 921(c). The Court reversed the earlier decisions, rebuffed the arguments advanced by Metropolitan and the Director, rejected the Fourth Circuit's analysis in *Fleetwood*, and ordered benefits continued at the original level because

> [A] mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition.

Rambo, 28 F.3d at 87, App. 4a. Requests for rehearing were filed by Metropolitan and the Director, OWCP. Both requests were denied and the accompanying Suggestions for Rehearing *En Banc* rejected.

REASONS FOR GRANTING THE PETITION

The LHWCA is intended to be the nationally uniform determinant of the rights and responsibilities of injured

maritime workers and their employers.[3] In all Circuits, the LHWCA's weekly benefit in cases similar to Mr. Rambo's is initially determined after assessment of *both* the "degree of physical impairment" *and* "any other factors or circumstances in the case which may affect [the worker's] capacity to earn wages in his disabled condition."[4] Compensation for the worker's lost earning capacity must be paid for as long as the loss of earning capacity continues,[5] subject to change only in accordance with Section 22.

Within the Fourth Circuit, benefits may be adjusted to fit changing economic circumstances. Within the Ninth Circuit, injured maritime workers and their employers are locked into the original benefit level unless the worker's physical condition changes and even if some or all of the other factors that initially determined the effect of the injury upon the worker's ability to earn change

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[3] Indeed, this Court's recognition of the need for a nationally uniform maritime compensation system forced enactment of the LHWCA. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

[4] 33 U.S.C. § 908(h). *See also* 33 U.S.C. § 902(10) (defining "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"; *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750 (1st Cir. 1992); *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988); *Fleetwood, supra;* and *Stevens v. Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom., Lockheed Shipbuilding Co. v. Director, OWCP*, 498 U.S. 1073 (1991).

[5] 33 U.S.C. Section 908(c)(21) requires payment of benefits "during the continuance of partial disability."

dramatically. Within the Ninth Circuit, the successful rehabilitation of physically impaired workers will not alter the weekly benefit level even if the new positions pay more than the jobs held before injury. Within the Ninth Circuit, workers whose disabilities were originally found nominal can secure no benefit increase if corporate restructuring, automation, increased foreign competition, or other changes combine with the physical limitations to erase future prospects for employment. Within the Fourth Circuit, both rehabilitated workers and those who bear the brunt of adverse economic change receive benefits appropriate to the true economic effects of the injury.

This case merits the Court's review because (1) there exists a direct conflict between the rulings of the Fourth and Ninth Circuits, (2) the conflict prevents the uniform application which the LHWCA requires, and (3) the Ninth Circuit's insistence that change in physical condition is an essential prerequisite to modification precludes the benefit flexibility which the LHWCA was designed to assure.

A. The Rulings Of The Fourth And Ninth Circuits Conflict.

The facts of the *Fleetwood* and *Rambo* proceedings are closely parallel, the results completely opposite. Mr. Fleetwood, a recipient of LHWCA benefits for lessened earning capacity, acquired new skills and a new, more remunerative job. An Administrative Law Judge determined that Mr. Fleetwood's earning capacity had improved to a degree which extinguished the earlier loss and terminated benefits. The Benefits Review Board

affirmed and Mr. Fleetwood appealed, arguing that modification pursuant to Section 22 was available only if his *physical* condition had changed.

The Fourth Circuit carefully distinguished the cases upon which Mr. Fleetwood relied and rejected his argument because "it is not in keeping with the purpose of the Act, which is to compensate workers for injuries that affect their wage-earning capabilities." *Fleetwood, supra,* at 1228-29. Presented with strikingly similar circumstances and the identical argument, the Ninth Circuit harkened back to its 60-year-old opinion in *McCormick S.S. Co. v. United States Employees' Compensation Commission,* 64 F.2d 84 (9th Cir. 1933), mischaracterized the true holding of that case,[6] and, without any discussion of statutory purposes or policies, reached the opposite result.

The conflict between the two Circuits could not be more pronounced. *Only* the Fourth Circuit's interpretation is consistent with the views expressed by this Court on each of the three occasions it has examined the history and intent of Section 22. The Ninth Circuit's ruling is "narrowly technical and impractical," at odds with the LHWCA's language and intent. *See O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254, at 255 (1972). *See also Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459

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[6] *McCormick* proves on careful reading to stand only for the unassailable proposition that a change in wages does not *necessarily* represent a change in earning capacity. The other Ninth Circuit precedent referenced in the decision below, *Pillsbury v. Alaska Packers Association,* 85 F.2d 758 (9th Cir. 1936), *rev'd on other grounds,* 301 U.S. 174 (1937), also involved no debate between changes in economic or physical conditions.

(1968) and *Intercounty Construction Corp. v. Walter*, 422 U.S. 1 (1975).

B. Although *Fleetwood* And *Rambo* Are The Only Cases That Directly Address The Issue Presented Here, The Ninth Circuit Probably Stands Alone In Requiring That Physical Change Precede Modification.

The Ninth Circuit's single-page analysis asserted that its conclusion, although different from that reached by the Fourth Circuit, was consistent with the views of the First and the Fifth.

> The Fourth Circuit's rule conflicts with the positions taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25, n.6 (1st Cir. 1982) ('Courts uniformly have held that a "change in conditions" . . . means a change in the employee's *physical condition*, not other conditions.' (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury* and holding that '[i]t has been uniformly held that the term "change in conditions" . . . means a change in the employee's *physical condition*, and not other conditions.' (emphasis added)). Thus, this Circuit's precedent is supported by the clear weight of authority.

Rambo, supra, at 88, App. 5a.

The Court was at least partially mistaken. *Burley* is almost certainly no longer the law within the Fifth Circuit.

> The LHWCA also provides for modification of an order awarding compensation 'on the ground of a change in conditions.' 33 U.S.C. § 922. The BRB and the Fourth Circuit have recognized that a change in wage-earning capacity, without a change in the claimant's physical condition, is a basis for modification. *See Fleetwood v. Newport News Shipbuilding & Drydock*, 776 F.2d 1225, 1228 (4th Cir. 1985); *Blake v. Ceres, Inc.*, 19 Ben. Rev. Bd. Serv. (MB) 219, 221 (1987). Therefore, if a claimant's wage-earning capacity increases to a rate higher than his pre-injury wages, the employer may request a modification on the basis that there is no longer a loss in wage-earning capacity. This interpretation of the statute is 'in keeping with the purpose of the Act, which is to compensate workers for injuries that affect their wage-earning capacities.' *Fleetwood*, 776 F.2d at 1228-29.

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, n.6 at 1042 (5th Cir. 1992). *See also Hole v. Miami Shipyard Corporation*, 640 F.2d 769 (5th Cir. 1981), approving awards of nominal benefits for the purpose of assuring future modification rights to workers faced with the possibility of future earning capacity changes.

General Dynamics, the First Circuit case on which the Ninth Circuit leaned, did not involve the issue at hand and simply offered an *in dicta* recitation of *Burley*'s own outmoded dictum. The fact that the Second[7] and District of Columbia[8] Circuits have taken the tack sailed by the

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[7] *LaFaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989).

[8] *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984).

Fifth in *Miami Shipyard* suggests that the Ninth Circuit stands alone or, possibly, accompanied by only the First in its interpretation of Section 22.

C. The Ninth Circuit's Ruling Is Neither Sensible Nor Consistent With The Statutory Scheme.

The reference to "conditions" (emphasis added, plural in original) in Section 22, if not itself indicative of an intent to encompass all factors impacting earning capacity, is at least ambiguous. The resolution of an ambiguity justifies reference to both common sense and the overall statutory scheme. Neither supports the Ninth Circuit's approach.

The Ninth Circuit's requirement that physical change underly modification simply makes no sense. Why should a worker with a deteriorating back be entitled to increased benefits and an injured worker adversely affected by a changing economic environment be denied similar relief? Why should an employer be rewarded with lowered benefit liability when *physical* rehabilitation efforts succeed and be denied a similar reward when reasonable accommodations to the worker's limitations can assure continued employment? What rationale supports continued benefit payments to any worker who regains the ability to earn the amounts originally lost?

The Ninth Circuit neither considered nor addressed these issues. The Fourth Circuit did.

> Under the Act, 'disability' is defined as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' 33

U.S.C. § 902(10). Thus, the Board was correct when it concluded that a worker is not compensated solely for physical impairment, but rather the worker is compensated for the future economic loss attributable to the physical impairment. The worker initially must prove his loss of wage-earning capacity to obtain benefits; therefore, his wage-earning capabilities should be relevant when considering a modification of an award. Thus, for example, if an employee initially was awarded a 40-percent partial disability award, and later found that his wage-earning capacity was much less than originally determined, he could then seek a modification. Likewise, an employer who finds that an employee's wage-earning capacity has not been affected to the degree originally determined should be able to seek a modification. As this case demonstrates, it is possible for a worker to show no physical improvement, but at the same time to acquire new job skills that enable him to compete again in the workforce. A sensible modification procedure would allow employees whose loss of wage-earning capacity becomes more apparent over time to obtain a larger disability award at a later date without requiring such an employee to demonstrate that his physical condition caused by the accident had changed. We fail to see how an employee whose wage-earning capacity had declined could be treated differently from the employee whose wage-earning capacity had improved without rendering inconsistent interpretations of the same statutory section of the LHWCA.

Without such a modification procedure, workers who had secured new skills and

> employment would be receiving disability compensation when they were not disabled and an unequitable distribution of limited financial resource would result. . . . Overall, the statutory scheme indicates that as long as an employee's physical injury affects his wage-earning capacity, he should be able to obtain disability payments; but, he should not be able to receive a stream of constant payments regardless of his wage-earning capacity.

Fleetwood, supra, at 1229.

The absence of a persuasive rationale for the Ninth Circuit's conclusion is not surprising. In a system which promises to deliver benefits when injury causes *economic* loss, there can be no justification for restricting benefit adjustment to those demonstrating *physical* change. In fact, such a restriction is wholly inconsistent with at least two other circumstances in which the LHWCA clearly contemplates modification of existing awards.[9]

Only the Fourth Circuit's interpretation of Section 22 is consistent with the LHWCA's focus on earning capacity and the clear need for modification avenues in other contexts. The Fourth Circuit's opinion both encourages and rewards the retraining and reemployment of injured

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[9] LHWCA benefits for death are clearly intended to terminate upon remarriage or loss of "student" status. *See* 33 U.S.C. §§ 909(b) and 902(18). If Section 22 requires physical change, the only route to an order terminating liability is unavailable. Post-award earnings must be reported on pain of benefit forfeiture. 33 U.S.C. § 908(j). If only physical change may justify benefit modification, no reason for the reporting requirement exists.

workers. The Ninth Circuit's conclusion discourages both.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: November 4, 1994.

Respectfully submitted,

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Counsel of Record for Petitioner

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed Aug. 10, 1994)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

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[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick,*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER
Respondent	)	(Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.,* 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

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(seal)

In the Matter of JOHN RAMBO Claimant against METROPOLITAN STEVEDORE COMPANY, Self-Administered Employer	Case No. 83-LHC-242 OWCP No. 18-6945

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.

2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company,* 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.,* 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

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[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll